In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1302

GEORGE WAYNE MAHNKE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief of Respondent, Commonwealth of Massachusetts, in Opposition to Petition for Writ of Certiorari.

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To the Honorable, the Chief Justice, and the Associate Justices of the United States Supreme Court:

The Commonwealth of Massachusetts respectfully requests that the issuance of a writ of certiorari to review the judgment and opinion of the Massachusetts Supreme Judicial Court, entered in said case on October 7, 1975, be denied.

Questions Presented.

I. Whether the state courts were correct in their factual determination that petitioner's post 4:15 p.m. admissions were the result of his "changed attitude," constituting a significant "break in the stream of events," and thereby properly held admissible.

II. Whether the state courts were correct in finding that petitioner's statements and actions subsequent to 4:15 p.m. were voluntary and not excludable under either the "cat-out-of-the-bag" theory or as "fruits of the poisonous tree."

III. Whether the state courts were correct in ruling that statements made by petitioner at the Massachusetts General Hospital were voluntary and admissible, for purposes of impeachment, under *Harris* v. *New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

Statement of Facts.

The events which form the basis for the petition evolved from efforts on the part of private citizens who sought to provide an explanation for the mysterious disappearance of Rhonda Bornstein, a nineteen-year-old woman.

Following notification of Ms. Bornstein's disappearance, a general investigation was conducted by Boston police and ultimately by Detective Stanley Gawlinski who first became associated with the case in December of 1970 (Appendix 5, 70).* Initially, the petitioner Mahnke was twice interviewed by Boston police as the last person known to have seen Ms.

* Hereinafter the Appendix will be cited as follows: (A.).

Bornstein on the evening of her disappearance, September 15, 1970 (A. 5, 70). Despite inconsistencies in Mahnke's statements (A. 4), there was no firm indication that a crime had been committed. The investigation by Boston police continued, but failed to determine the cause of the victim's disappearance or her location.

During the fifteen-month period Rhonda was missing, her father and brother, Manuel and Jordan Bornstein, respectively, along with several friends of the Bornstein family, conducted an intensive investigation into her whereabouts (A. 5-6, 71-72). For the most part, these friends of the family, styled the "concerned group" by the trial judge, included: James Ferreri, Frank Fontacchio, Gary Fisher, John (Jay) Campbell and Joseph (Jay) Heard (A. 5-6, 70).

Convinced that petitioner was the key to the disappearance of his daughter and frustrated with the progress of the police investigation, Manuel Bornstein and the "concerned group" entered upon a course of conduct designed to compel Mahnke to answer questions which they felt he alone could resolve. These unsanctioned, private activities encompassed a continuing program of surveillance and harassment which culminated in Mahnke's forceful abduction from Mount Ida Junior College during the early evening of December 8, 1971 (A. 67, 73-74).

Although the confrontation had been planned, the abduction was not. In a spontaneous and unpremeditated move, Mahnke was transported to an isolated hunting cabin in Worthington, Massachusetts (A. 7, 75). The abductors had no key to the lodge, but had to break a pane of glass to get in (A. 7, 77). Mr. Bornstein, who followed in a second car, had no knowledge of where they were going and soon lost the car with Mahnke and his abductors (A. 74).

In the cabin, Mahnke was subjected to extensive questioning and intimidation by his abductors (A. 8, 79). Notwithstanding the intimidation, Mahnke and one of his captors, James Ferreri,

established a relative degree of friendship that eventually developed into a relationship of mutual trust between them (A. 9, 81, 95). (This relationship is set out more fully in the trial judge's initial and supplementary findings of fact (A. 81, 127).)

As a result of the intimidation exerted by the group while in the cabin, Mahnke made certain admissions there to Ferreri and Campbell relative to the victim's death and location of her body (A. 8-9, 81-82). Thereupon, all hostility and intimidation on the part of the group towards petitioner ceased (A. 9, 83). No further attempt was made to elicit additional information from him (A. 9, 83). In turn, Mahnke's conduct towards the group became voluntary and cooperative (A. 83, 87, 95). Mahnke later evidenced this changed attitude by confiding to Ferreri his relief at having finally disclosed his secret, simultaneously referring to Ferreri and Campbell as "the first friends I have had in fifteen months" (A. 9, 83). This relationship continued from the time the incriminating statements were made until departure from the cabin at approximately 4:15 p.m. on December 9, 1971 (A. 83-84).

As the group left the cabin, they were confronted by two hunters, later identified as the Worthington chief of police, David Tyler, and one Reino Liimatainen, who had a loaded shotgun in his possession (A. 9, 84-87). Both men had become suspicious of the group's presence at the cabin and inquired of them (primarily Fisher) their purpose (A. 9, 85). While Tyler questioned Fisher, Liimatainen stated in a loud and menacing manner that "If there is any funny business I will blow your guts out" (A. 10, 85). During the course of this conversation, the entire group was under the immediate physical control of Tyler and Liimatainen (A. 10, 85). If he so desired, Mahnke was free to have effectuated his release, but deliberately chose not to do so (A. 85-87).

Fisher apparently satisfied Tyler that their presence at the cabin was lawful, for the group was detained no further (A. 10, 87). As they left, Mahnke remarked to Ferreri, "See, I could have gotten away if I wanted to, but I didn't" (A. 10, 87).

Mahnke then directed Ferreri to drive to the Sears, Roebuck parking lot in Boston's Fenway district (A. 10, 88), voluntarily contributing a small sum to the toll paid at the Massachusetts Turnpike exit (A. 88). While crossing a bridge over the Metropolitan Boston Transit Authority (M.B.T.A.) tracks, Mahnke gestured towards an island in the middle of the roadway and stated to Ferreri, "That's where it happened" (A. 88).

While near the Sears building, Mahnke disclosed additional information not previously stated at Worthington (A. 89, 90, 93). Mahnke verbally described the site of the grave to Ferreri (A. 10, 89), who left to search for its location, but returned shortly, confused as to the description given (A. 89). During Ferreri's brief absence Mahnke casually stated to Heard, without solicitation, that he (Mahnke) had indeed killed Rhonda Bornstein (A. 10, 93).

The trial court also found that Mahnke expressed no fear of culpability for Ms. Bornstein's death (A. 93, 128). In assessing his legal chances, Mahnke declared to Heard that "he wasn't worried about the consequences because the 'concerned group' were hostile citizens and their testimony would never hold up in court . . ." (A. 93).

Mahnke subsequently accompanied Ferreri below the bridge and directed him to the location of the grave (A. 89-90). He then left Ferreri in the vicinity of the grave and returned by himself to the parking area where he independently placed himself in the company of Heard and Fisher (A. 90-91). At this time, "if Mahnke had desired, he could easily and readily have escaped from the control of the concerned group . . ." (A. 91).

Mahnke was, upon request, driven to his home (A. 93-94) and subsequently taken by his parents to Massachusetts General Hospital (A. 104) where he was interrogated by members of the Boston police with respect to the death of Rhonda Bornstein (A. 106-108). These statements, found to have been voluntarily made (A. 109-110), were later suppressed and held to be inadmissible (A. 122), except for the limited purpose of impeachment under *Harris* v. *New York*, 401 U.S. 222, 224, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1 (1971) (A. 122).

The trial judge also suppressed, as the direct product of coercion, all statements made by Mahnke from his abduction to the time of the departure from the cabin at 4:15 p.m. (A. 112). However, Mahnke's post 4:15 p.m. "statements and actions leading to the discovery of the deceased" were held admissible as being voluntary and the product of a free will (A. 112-114). In supplementary findings ordered upon remand, the trial judge specified that "the facts surrounding the initial admission in the cabin in Worthington did not control the character of or circumstances relating to subsequent admissions made near the Sears and Roebuck store and at the Massachusetts General Hospital" (A. 126).

Reasons for Denial of the Writ.

I. This Petition Brings No Issue which is Properly the Subject of a Writ of Certiorari.

The crux of this petition concerns a factual dispute as to the voluntariness of certain statements made by petitioner. Relief is thus predicated solely upon a reexamination by this Court of the evidence bearing upon petitioner's subjective intent. That evidence has been comprehensively addressed by the trial

judge's detailed initial and supplementary findings made after three days of hearings, during which petitioner himself testified at length.

> [I]t is clear from the record that the trial judge conducted the proceedings with extraordinary competence and thoroughness. . . . Hennessey, J. (dissenting) (A. 62.)

Nor is the minority in dissent "willing to say that the judge below was plainly wrong in his findings" (A. 26-27).

Thus petitioner seeks a factual resolution by this Court. However, the United States Supreme Court

> does not sit as in *nisi prius* to appraise contradictory factual questions. . . . *Ker* v. *California*, 374 U.S. 23, 34, 83 S. Ct. 1623, 1630, 10 L. Ed. 2d 726 (1963).

As stated in *Watts* v. *Indiana*, 338 U.S. 49, 51-52, 69 S. Ct. 1347, 1348-49, 93 L. Ed. 1801 (1949),

> [T]here has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by . . . [the trial judge].

This is not to suggest that the Court is foreclosed from "making our own examination of the record," *Spano* v. *New York*, 360 U.S. 315, 316, 79 S. Ct. 1202, 1203, 3 L. Ed. 2d 1265 (1959). Most respectfully, however, the instant case involved factual inferences as to the petitioner's state of mind which the trial judge was best positioned to make:

> This is particularly apposite because the trial judge . . . [is] closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony. *Haynes* v. *Washington*, 373 U.S. 503, 516, 83 S. Ct. 1336, 1344, 10 L. Ed. 2d 513 (1963).

Moreover, as the Court indicated in *Lyons* v. *Oklahoma*, 322 U.S. 596, 602, 64 S. Ct. 1208, 1212, 88 L. Ed. 432 (1944):

> . . . where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of witnesses but the legal duty is upon them to make the decision.

The jury in the instant case, having received comprehensive instructions on their duty to make an independent judgment as to the voluntariness of petitioner's statements, found, as indicated by their verdict, that the admitted statements were voluntarily made. In lieu of acceptance of the trial court's and jury's findings, this petition would require the Court to assess 2,267 pages of pretrial testimony alone without benefit of exposure to witness bearing or demeanor.

The findings made by the trial court have also been accepted by the highest appellate court for the Commonwealth of Massachusetts. Such concurrence, the Commonwealth respectfully submits, would effectively restrict the grant of certiorari except in the presence "of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 538, 94 L. Ed. 1392 (1949). While certiorari has been granted to ameliorate "obvious" error in such cases as *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct.

624, 629, 4 L. Ed. 2d 654 (1960), and *Garner* v. *Louisiana*, 368 U.S. 157, 173-174, 82 S. Ct. 248, 257, 7 L. Ed. 2d 207 (1961), those cases were reviewed because the convictions were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Garner* v. *Louisiana*, *supra*, at 174. That situation is not present here. In upholding the judge's findings, the Supreme Judicial Court majority stated,

> Here there was extensive testimony . . . tending to demonstrate the change of mood and relationship found by the trial judge below. It was more than sufficient to sustain the government's burden of proof. (A. 28.)

The absence of a legal controversy of importance in the instant case further dictates a denial of certiorari where, as here, only the facts are in dispute. Clearly the constitutional standards applicable to determining voluntariness have been enumerated in numerous United States Supreme Court decisions. See Appendix pp. 20-22.

The facts here do not suggest a need for further elaboration upon the previously stated requirements for ascertaining voluntariness. The unusual and uncommon circumstances in the present case also indicate that few, if any citizens, apart from petitioner, will be affected by the Court's resolution of the questions presented. Certiorari, by its nature, has been granted to controversies of timely and general importance to the public, as distinguished from the immediate needs of individual applicants. Petitioner, in seeking this Court's determination of an atypical factual dispute, has not brought such a controversy before it.

II. The State Courts Rightly Conclude that the Petitioner's Post 4:15 p.m. Admissions were the Result of his "Changed Attitude," Constituting a Significant "Break in the Stream of Events," and Properly Held them to be Admissible.

The Commonwealth of Massachusetts in no manner condones the activity of the "concerned group." Nevertheless, the admissibility of petitioner's statements, as a constitutional matter, are governed by the due process standard of voluntariness, *Procunier* v. *Atchley*, 400 U.S. 446, 453, 91 S. Ct. 485, 489, 27 L. Ed. 2d 524 (1971), and must be resolved in light of the totality of the underlying circumstances. *Clewis* v. *Texas*, 386 U.S. 707, 708, 87 S. Ct. 1338, 1339, 18 L. Ed. 2d 423 (1967); *Davis* v. *North Carolina*, 384 U.S. 737, 741, 86 S. Ct. 1761, 1764, 16 L. Ed. 2d 895 (1966). In doing so, the state courts had to decide whether petitioner, at the time of the admissions, was in possession of the requisite "mental freedom" to admit or deny his suspected participation in a crime. *Ashcraft* v. *Tennessee*, 322 U.S. 143, 154, 64 S. Ct. 921, 926, 88 L. Ed. 1192 (1944); *Lyons* v. *Oklahoma*, 322 U.S. 596, 602, 64 S. Ct. 1208, 1212, 88 L. Ed. 432 (1944).

Since several statements were made at different periods in time, each was fully examined in the state court for voluntariness under the same "totality of circumstances" test. *United States* v. *Bayer*, 331 U.S. 532, 539, 67 S. Ct. 1394, 1397, 91 L. Ed. 1654 (1947). While prior coercion may be relevant to subsequent admissions, it is not conclusive. This Court has never held that "making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *Bayer*, *supra*, at 541. Supplemental statements become admissible where, as here, petitioner was under no compulsion when the unsolicited, post 4:15 p.m. statements

were made. With the removal of all elements of coercion, a "break in the stream of events" was found in this case to have occurred, "sufficient to insulate the [subsequent] statement from the effect of all that went before." *Clewis* v. *Texas*, 386 U.S. 707, 710, 87 S. Ct. 1338, 1340, 18 L. Ed. 2d 423 (1967). Petitioner's readily discernible change in attitude and relationship constitutes such a "break in the stream of events."

In the instant case, all intimidation ceased after the original admissions had been made (A. 21, 83). Concomitantly, there was an attitude of relief on Mahnke's part for having at last shared his terrible secret (A. 9, 83, 87). An atmosphere of mutual trust and cooperation, particularly between Mahnke and Ferreri, developed (A. 9, 81, 83, 87). Any residue of coercion had completely dissipated (A. 21) once the group had left the cabin. Mahnke was immediately thereafter presented with numerous opportunities to leave the company of his abductors (A. 21, 85, 91, 94), which opportunities he completely disregarded although "he knew he could have effected an escape" (A. 21, 87). Liimatainen's warning about "funny business" was "an invitation to outcry" for Mahnke (A. 21-22). Instead, he spontaneously stated to Ferreri, "See, I could have gotten away if I wanted to, but I didn't" (A. 87).

Nor did the mere continuance in the presence of the group coerce Mahnke. Quite the contrary, upon departure from the cabin, Mahnke evidenced complete control of his situation. On the return trip, Mahnke "conversed in a friendly manner with Ferreri" while Campbell and Fontacchio "dozed" (A. 22). He voluntarily contributed a small sum to the toll at the turnpike exit (A. 88) and freely gave Ferreri directions to the Sears parking lot (A. 88), indicating, entirely without solicitation, the location where he had struck Ms. Bornstein (A. 88).

Later, Mahnke, without intimidation (A. 10, 89-90), orally directed Ferreri to her body. While Ferreri searched, Mahnke "engaged in incriminating conversations with Heard" (A. 10-

11, 22, 92-93), and expressed a complete lack of apprehension regarding culpability (A. 10-11, 22, 93). Mahnke later requested that Ferreri do him a favor by not turning the body in until after Christmas (A. 94, 113). In his absence, the group debated Mahnke's request for approximately two hours before taking any action, thereby demonstrating further evidence of a change in the relationship between the principals (A. 94, 113-114).

These and subsidiary factors, detailed in the record, led the trial court and the Supreme Judicial Court to conclude that Mahnke "acted like a man who felt sufficiently in control of his circumstances to make a free choice" (A. 22). The combination of these components supports the conclusion of Mahnke's changed attitude (A. 83, 87), constituting a substantial "break in the chain of events" sufficient to separate the post 4:15 p.m. statements from the coercive circumstances surrounding the initial admissions. Petitioner's behavior after 4:15 p.m. presents objective evidence that the circumstances behind Mahnke's earlier and admittedly involuntary statements did not control the character of his subsequent admissions. Cf. *Clewis* v. *Texas*, 386 U.S. 707, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967).

Three cases cited by petitioner, *Clewis* v. *Texas*, 386 U.S. 707, 711-712, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967) ("interrogation . . . designed to elicit . . . the police view of the truth"); *Leyra* v. *Denno*, 347 U.S. 556, 561, 74 S. Ct. 716, 94 L. Ed. 948 (1954) ("trance-like submission [imposed by] . . . a highly skilled psychiatrist"); and *Beecher* v. *Alabama*, 389 U.S. 35, 38, 88 S. Ct. 189, 19 L. Ed. 2d 35 (1967) ("wounded . . . under the influence of drugs, and at the complete mercy of the prison hospital authorities"), concerned confessions extracted as part of a continuous coercive process entirely dissimilar to the circumstances demonstrating the changed relationship here. The voluntariness of statements, this Court

has said, must be determined by the facts of each particular situation, not through a "mere color matching" of analogous cases. *Reck* v. *Pate*, 367 U.S. 433, 442, 81 S. Ct. 1541, 1547, 6 L. Ed. 2d 948 (1961). The facts surrounding Mahnke's post 4:15 p.m. admissions illustrate that the majority were entirely unsolicited and spontaneously made following an identifiable break in the stream of events.

Petitioner also cites *United States* v. *Bayer*, 331 U.S. 532, 67 S. Ct. 1394, 91 L. Ed. 1654 (1947), which upheld the admissibility of subsequent incriminating statements that disclosed additional information, where an identifiable "break in the stream of events" was established between an earlier coerced confession. Although the time sequence between the first and second confessions in *Bayer*, *supra*, is more extended, the additional information volunteered in Mahnke's post 4:15 p.m. admissions made them more remote from his prior statements than those in the *Bayer* case. Mahnke's unsolicited disclosure of these additional facts (A. 10, 88, 93), together with his remarks to Heard that his prior statements could not be used against him (A. 10-11, 22, 93), further warranted the finding of no causal relationship between the first statements and Mahnke's subsequent admissions. *Evans* v. *United States*, 375 F. 2d 355 (8th Cir. 1967); *Gilpin* v. *United States*, 415 F. 2d 638 (5th Cir. 1969).

Petitioner's conduct and remarks to Ferreri following the group's confrontation with Chief Tyler and Liimatainen signified a substantial break in the former context of coercion. Mahnke thereafter acted independent of coercion. While knowingly under the control of the hunters (A. 21, 85), Mahnke, with complete mental freedom, decided to accompany the group (A. 87). This decision was made not upon intimidation or duress, but as the result of the change in relationship. The record is replete with further indicia of this changed attitude. (See A. 21-22, 87-95, 112-114.) These factors readily distinguish Mahnke's subsequent admissions from the circum-

stances surrounding his earlier statements, and justify the finding of a "break in the stream of events" sufficient to guarantee the voluntariness of the later statements. *Clewis* v. *Texas*, 386 U.S. 707, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967).

III. The State Courts Properly Found that the Petitioner's Statements and Actions Subsequent to 4:15 P.M. Were Admissible and were Not Excludable either under the "Cat-out-of-the-Bag" Theory or as "Fruits of the Poisonous Tree."

Whether petitioner's post 4:15 p.m. statements and actions were excludable as improper "fruits" or under the "cat-out-of-the-bag" doctrine had to be determined by inquiry into the facts. Essentially, the state courts had to determine, in light of all the underlying circumstances, whether Mahnke's subsequent admissions were the consequence of the psychological effects of prior coercion. *Cf. Nardone* v. *United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 267, 84 L. Ed. 307 (1939) (subsequent admissions had "become so attenuated as to dissipate the taint" of prior coercion), and *Darwin* v. *Connecticut*, 391 U.S. 346, 88 S. Ct. 1488, 20 L. Ed. 2d 630 (1968) (dissenting opinion) (further statements attributed to a sense of "little to lose").

In the instant case, no cat-out-of-the-bag effects are factually presented (A. 24, 128). The trial court, after extensive hearings determined that Mahnke's subsequent statements and actions were admissible, and, in the language of the Supreme Judicial Court majority, "attributable to the peculiar friendship which . . . [he] formed with Ferreri or to relief at finally having divulged his secret at last" (A. 28). The record also illustrates that these later statements were totally unfettered (A. 88, 93, 95, 128). Both courts' conclusion that Mahnke did not believe he had little to lose by repetition or

elaboration upon earlier admissions (A. 24, 128), is also clearly supported by the evidence. While speaking to Heard, Mahnke "evidenced no fear of culpability" (A. 24, 128) for the death of Rhonda Bornstein, (correctly) stating that the information related in the cabin could not be used against him. Mahnke's previous exculpatory statements further indicate that he logically believed he could not be convicted for the victim's death.

Moreover, these statements were made with no physical restraint whatsoever placed upon petitioner's freedom of movement (A. 128). While near the Sears parking area, Mahnke was free to have effectuated an escape (A. 91). Instead, he voluntarily related information he had not previously disclosed concerning the site of the occurrence of the incident (A. 88), and the location of the victim's body (A. 89, 90). Such behavior displayed a state of mind completely distinct from that preceding his initial admissions. The spontaneous nature of these statements indicates that they were not products of any continuing coercion.

As the Supreme Judicial Court succinctly stated (A. 25),

> Fear, continuation of coercion effects, and a sense of the futility of attempting to get the cat back in the bag are the objects of the analysis.

The evidence clearly substantiated both courts' conclusion that none of the above factors were imputable to Mahnke's subsequent admissions.

Nor can these statements in any manner be qualified as "fruits of the poisonous tree" (A. 25-26, 114-115). As the trial court stated, "the discovery of the body . . . was not a 'fruit' of the original involuntary statement because this evidence did not *flow from* this statement" (emphasis in original) (A. 115). Mahnke had initially stated that the body was "in Boston near Sears and Roebuck" (A. 115). The gravesite was not described with any greater particularity at that time. *Arguendo*, dis-

covery of the victim's body upon this information alone would have constituted "fruit" of the prior coercion. However, Mahnke's actual disclosure of the location of the victim's body was, by all reasonable inferences, the product of his free will, attributable to a readily identifiable and unmistakable change in attitude and relationship. Mahnke, at this point, was free to act as he chose (A. 128). He could readily have fled (A. 21, 91, 113) if he so desired. Notwithstanding, he willingly gave Ferreri detailed verbal directions to the gravesite (A. 22, 89). He later voiced his aversion to accompanying Ferreri down to the place where Rhonda Bornstein was buried (A. 89-90, 127), stating that the burial site was "spooked" (A. 89, 128). However, Mahnke consented to accompany Ferreri "when it became apparent that his knowledge of the exact burial spot was necessary" (A. 128). Thereafter, he pointed out the location of the grave to Ferreri, stating, "This is it. I am not going any further" (A. 90). Mahnke then walked back alone to the parking area and rejoined Heard and Fisher (A. 90-91). Mahnke's selectivity of what he would and would not do exemplified his freedom of action. Application of these facts to petitioner's asserted "standard" for determination of improper "fruits" (Petitioner's Brief 27) demonstrates that Rhonda Bornstein's body was discovered by "means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963).

The same set of circumstances which categorically distinguish this evidence from any preceding taint also establish that any "connection between the illegality and the evidence offered is so attenuated as to dissipate the taint," *Nardone* v. *United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 267, 84 L. Ed. 307 (1939). Petitioner's simple recitation of artificial standards for ascertaining the degree of attenuation do not, standing alone, establish contamination. Such a conclusion

entails factual considerations analogous to those for voluntariness and are "not a matter of mathematical determination. Essentially it invites psychological judgment. . . ." *Haley* v. *Ohio*, 332 U.S. 596, 603, 68 S. Ct. 302, 305, 92 L. Ed. 496 (1948) (Frankfurter, J., concurring). Here reasonable inferences drawn from previously established facts and demeanor evidenced that Mahnke's change in attitude was so complete "that the taint of any illegality was entirely dissipated" (A. 115). While the time sequence was certainly not protracted, Mahnke, nevertheless, "was afforded adequate time for deliberate reflection prior to making a subsequent incriminating statement" (Petitioner's Brief 29). During the approximately two-hour drive from Worthington to Boston, "the conversation they [Mahnke and Ferreri] had, consistent with the change in the situation, was friendly; it was not about Rhonda Bornstein" (A. 127). This time period certainly provided sufficient opportunity for petitioner to assess his situation without intimidating influence. Thus, Mahnke made a deliberate and a considered decision to disclose the location of the victim's body, secure in the knowledge that his prior statements could not be introduced against him.

Moreover, each case cited in support of petitioner's improper "fruits" contention concerns illegal activity by government officials. *Cf. Fisher* v. *Scafati*, 439 F. 2d 307 (1st Cir. 1971). There a subsequent confession was ruled inadmissible because the defendant had not been informed that an earlier confession was invalid and could not be used against him. However, in spite of the fact that Mahnke correctly knew and affirmatively stated that his earlier statements were inadmissible, such warnings are not apposite to any statements made by Mahnke to the group. *See United States* v. *Casteel*, 476 F. 2d 152 (10th Cir. 1973); *United States* v. *Antonelli*, 434 F. 2d 335 (2d Cir. 1970).

This same constitutional principle undercuts petitioner's entire contention regarding "fruits of the poisonous tree." That doctrine has been judicially ascribed only to the "fruits" of illegal activity on the part of government officials, not private citizens. *Burdeau* v. *McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). Whether such activity concerns an improper search and seizure or involuntary statements is irrelevant. The result prescribed was designed to prevent sovereign authorities from benefiting from their illegal activities. Petitioner would have the Court apply the doctrine to involuntary statements made to private individuals, stating that, "there exists no case ruling negatively upon this proposition" (Petitioner's Brief 26). There is no constitutional requirement that the evidence obtained by an illegal private search and seizure be suppressed. *Burdeau* v. *McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921); *United States* v. *Goldberg*, 330 F. 2d 30 (3d Cir. 1964). It would be anomalous to hold inadmissible evidence allegedly obtained through involuntary statements made to private citizens. Such an extension is neither applicable to the facts of this case nor constitutionally mandated.

IV. Statements Made by Petitioner at Massachusetts General Hospital were Properly Held to be Voluntary and Admissible for Purposes of Impeachment under Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

Application of the traditional standards for evaluating voluntariness warrants the conclusion that statements made by petitioner at the hospital were freely given. *Cf. United States* v. *Bayer*, 331 U.S. 532, 67 S. Ct. 1394, 91 L. Ed. 1654 (1947); *Clewis* v. *Texas*, 386 U.S. 707, 87 S. Ct. 1338, 18 L.

Ed. 2d 423 (1967). The statements made at the hospital not only were separated geographically from those made in Worthington, but were made to entirely different individuals (police officials), following *Miranda* warnings. *See Davis* v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966). Additional circumstances attest to the voluntary character of these statements.

Mahnke had left the "concerned group" several hours earlier (*Darwin* v. *Connecticut*, 391 U.S. 346, 88 S. Ct. 1488, 20 L. Ed. 2d 630 (1968)). He had spoken with his family, who had taken him to the hospital (A. 104). *See Reck* v. *Pate*, 367 U.S. 433, 81 S. Ct. 1541, 6 L. Ed. 2d 948 (1961). The questioning by police at the hospital was courteous (A. 37, 121) and conducted in neither a grueling (A. 109) (*Ashcraft* v. *Tennessee*, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192 (1944)) or unreasonably lengthy manner (A. 106-107) (*Clewis* v. *Texas*, 386 U.S. 707, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967)). Nor was Mahnke's will overborne (A. 36, 109). To the contrary, the record reveals that Mahnke exhibited complete control over the interview (A. 109):

> This finding is quite obvious from the cagey and calculated manner in which Mahnke weighed the consequences of each question and answer . . . (A. 109).

Mahnke decided which questions he would answer and those he would not (A. 106). ". . . Mahnke remained silent in response to a number of questions, while answering other questions" (A. 106). At one point, he insisted that the stenographer leave (A. 106-107).

Throughout the interview with police officials Mahnke was physically and mentally alert (A. 107). There was no evidence to suggest that he had been medicated upon admis-

sion to the hospital (A. 107) (*Leyra* v. *Denno*, 347 U.S. 556, 74 S. Ct. 716, 94 L. Ed. 948 (1954)).

> . . . [T]he hospital report indicates that he was normal in all respects (A. 107).

Mahnke was found to be "an intelligent and educated young man" (A. 121), *Lisenba* v. *California*, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941), and had "requested to read the Miranda warning card" (A. 108). Having been informed of his rights (A. 106), Mahnke made certain admissions to police officials concerning the death of Rhonda Bornstein (A. 107). It is apparent that statements made by Mahnke at the hospital were sufficiently distinguishable from those made in Worthington to ensure their trustworthiness.

The trial court ruled, however, that the statements by Mahnke at the hospital, although voluntary, were not admissible in the Commonwealth's case in chief because two detectives, who accompanied other police officers who questioned Mahnke, but who did not participate in the questioning, knew of attempts by Mahnke's attorney to be present while his client was being questioned (A. 119).

Petitioner asserts that the rule announced in *Harris* is restricted to mere technical violations of the *Miranda* warnings and not intended to include intentional police misconduct. Such contention is misdirected.

In *Harris* v. *New York*, 401 U.S. 222, 224, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1 (1971), the Court rejected the argument that "evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes. . . ." The Court's opinion there reflected an obvious balancing test. The possibility of the defendant's potentially perjurious testimony was found to outweigh the need for deterrence of improper

police conduct that might be effectuated by total exclusion of such evidence.

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . [T]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. *Id.*, at 225-226.

The significance placed upon the impeachment of perjured testimony is further demonstrated in *Oregon* v. *Hass*, _____ U.S. _____, _____ (1975),[a] where the Court restated its concern that exclusionary rules could potentially "free [the defendant] from the embarrassment of impeachment evidence from . . . [his] own mouth." In *Hass*, *supra*, the defendant was arrested for bicycle theft and given the *Miranda* warnings. Hass and a police officer later went to locate one of the stolen bicycles. On the way, Hass stated that he wanted to telephone his attorney, but was told he could use the phone once they returned to police headquarters. Shortly thereafter, Hass directed the police officer to one of the stolen bicycles. Upon the authority of *Harris* v. *New York*, *supra*, the Court found that the deliberate misconduct by the police officer, which failed to afford Hass his full constitutional right to counsel, did not preclude the introduction of these statements to impugn the truth of Hass' testimony. This situation is closely analogous to that factually presented in the instant case.

Moreover, *Harris* places no additional burden upon petitioner's right to testify on his own behalf. Petitioner is obligated to testify truthfully whether or not he is subject to im-

[a](March 19, 1975) 43 U.S.L.W. 4417, 4420.

peachment under the rule of *Harris*. Here petitioner has been protected from improper police conduct by the exclusion, other than for purposes of preventing perjury, of the evidence at the hospital. The exception to this exclusionary rule is no more an encouragement to such misconduct than are those exceptions announced in *Hass* and *Harris*.

Conclusion.

For the foregoing reasons, the Commonwealth of Massachusetts respectively submits that the writ of certiorari should be denied.

Respectfully submitted,
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